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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Yvonne Gonzalez Rogers, Judge

)	
IN RE APPLE IPHONE)	
ANTITRUST LITIGATION.)	NO. CV 11-06714-YGR
)	
)	
<hr/> DONALD R. CAMERON, ET AL.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. CV 19-03074-YGR
)	
APPLE, INC.,)	
)	
Defendant.)	
)	
<hr/> EPIC GAMES, INC.,)	
)	
Plaintiff,)	
)	
VS.)	NO. CV 20-05640-YGR
)	
APPLE, INC.,)	
)	
Defendant.)	
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Oakland, California
Monday, October 19, 2020

TRANSCRIPT OF PROCEEDINGS VIA ZOOM

(Appearances listed on the following page)

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Official Reporter

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Monday - October 19, 2020

9:42 a.m.

P R O C E E D I N G S

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THE CLERK: Calling Civil Action 11-6714, which is the In Re Apple iPhone Antitrust Litigation. The related case is Civil 19-3074, which is the Cameron vs. Apple. That's a consolidated case. And then Civil 20-5640, Epic Games vs. Apple, Inc.

THE COURT: I will have everyone state their appearances for the record. Let's start with the Epic Games vs. Apple. For Epic Games, your appearances, please.

MR. BORNSTEIN: Good morning, Your Honor. Gary Bornstein for the plaintiff.

THE COURT: Good morning.

MS. MOSKOWITZ: Good morning, Your Honor. Lauren Moskowitz from Cravath, also for Epic.

THE COURT: Good morning.

For Apple.

MR. PERRY: Good morning, Your Honor. Mark Perry from Gibson Dunn for Apple.

THE COURT: Good morning.

MS. RICHMAN: Good morning, Your Honor. Cynthia Richman also on behalf of Apple.

THE COURT: That's on behalf of Apple on all three cases; correct?

1 **MR. PERRY:** Correct, Your Honor.

2 **THE COURT:** Now with respect to the Cameron case.

3 **MR. LOPEZ:** Good morning, Your Honor. Rob Lopez for
4 the developers.

5 **MR. SIEGEL:** Good morning, Your Honor. Ben Siegel of
6 Hagens Berman, also for the developer plaintiffs.

7 **THE COURT:** Good morning.

8 And then the In Re Apple iPhone Antitrust Litigation case,
9 so the consumer case.

10 **MS. BYRD:** Good morning, Your Honor. Rachele Byrd
11 from Wolf Haldenstein on behalf of the plaintiffs.

12 **THE COURT:** Okay. Good morning, everyone.

13 We have a lot to do today. And, again, apologies for the
14 technical issues we were having. We'll investigate those after
15 we're done here.

16 So in terms of the schedule, as you now know, I've set the
17 trial on May 4th. Just a little bit more color to that
18 decision. I anticipate -- I'm not exactly sure -- I don't
19 think any of us are -- where this country is going to be next
20 spring and when we are going to have jury trials out, but I
21 certainly think that by the summer, we will be doing jury
22 trials. I'm hoping to have some jury trials in the winter, but
23 I'm not exactly sure whether we are going to be able to manage
24 that, and certainly all criminal cases go out first.

25 When I spoke with you about a trial schedule, my

1 anticipation was that this was going to be a jury case, and so
2 to be certain of when I could get you out, I talked about a
3 July trial date because I was certain that I could get you out
4 in July after a pretty big class action that I have to try in
5 June.

6 Once you decided you wanted it to be a bench trial, then I
7 gave you the last possible date that I'm going to be doing
8 bench trials because once the summer hits, I'm not doing bench
9 trials. I'm doing jury trials, and we are going to be stacked
10 up and backed up.

11 So given that you chose to do a bench trial, that was the
12 timing that worked best for me. And given our limited
13 resources here at the court, that really drove the decision. A
14 couple of months, you know, doesn't change things one way or
15 the other. And fortunately or unfortunately, it just means a
16 little -- some more resources to get it done in that time
17 frame, and you all have the resources, so that's why I decided
18 what I did.

19 That being said, it is an aggressive schedule, and so that
20 means that everybody has to work not only cooperatively, but
21 you have to work efficiently, and a number of the things that I
22 saw when I read the joint CMC statements concerned me about the
23 nature of efficiencies, so we'll talk about some of that.

24 The other thing that I'd like to do is to make sure that
25 we are all on the same page so that we aren't dealing with

1 these things later about the legal framework, and that's the
2 first place we're going to talk or that's the first set of
3 issues that we're going to talk about.

4 I understand that you, on both sides, probably don't agree
5 with a number of things that were in my order with respect to
6 the preliminary injunction at Docket 118, but I think that we
7 should either be able to agree on the legal framework or where
8 there is disagreements, we should figure those things out. The
9 application of the facts to the legal framework is, as they
10 say, where the rubber meets the road, but let's -- I want to
11 make sure that we don't waste time later when we're really into
12 the trial on the issues of what the legal framework is about.

13 So we'll begin with Epic and your counts. You're got 10
14 different counts. Counts 1, 2, 3, and 7 all relate to a
15 relevant market of iOS app distribution from your perspective.
16 Counts 4, 5, and 8 deal with your allegations regarding a
17 relevant market of the iOS in-app payment processing market.
18 Six and 9 relate to tying and then 10 relates to unfair
19 competition. So that's the way that I'm thinking in grouping
20 those issues.

21 I outlined what I believed the legal framework was for the
22 maintenance claims under Section 2 of the Sherman Act in pages
23 11 to 15 of my order. If you don't agree with the legal
24 framework, I want to know that you don't agree. In pages 21 to
25 23, I discuss the legal framework for the tying claims. If you

1 don't agree with the framework, I want to know.

2 We haven't really had any discussion about the UCL claim.
3 The Cartwright claims were all put to the side. And nothing on
4 essential facilities and nothing on Section 1 other than the
5 tying claims. And of course nothing on the 17200.

6 So what I'd like to see -- and I'm willing to hear your
7 perspectives on it -- is probably a trial brief maybe in
8 January, because I don't need it right this second -- a trial
9 brief in January that goes through the elements of these
10 claims. Think about it kind of like joint jury instructions.
11 So outline of the elements. If you agree, you tell me you
12 agree. They're joint submissions. If you don't agree, then
13 you give me your various perspectives and the legal authority
14 for the perspectives. In jury instructions, you don't argue
15 the facts. I don't really want you to argue the facts. I just
16 want to make sure that we're on the same page.

17 The benefit of doing this really early is that it focuses
18 you on your elements of proof, and I can tell you whenever I
19 write an order, that's where I go. I go first to the elements,
20 and this would be a document that I would use to guide that.
21 Now, if we have disagreements about the legal framework, we can
22 have a discussion about that in January and February,
23 irrespective of where discovery is, and that way we're ahead of
24 the game, and so once we get to trial, we're really talking
25 about how the facts get applied across those elements.

1 The other thing -- and in order to keep it, again,
2 efficient is it's important to just -- for me to know when
3 claims rise and fall with something else. So, for instance --
4 and I'll look to you, either Mr. Bornstein or Ms. Moskowitz --
5 do your Cartwright claims rise and fall with the Sherman Act
6 claims, or is there something else you have to prove or is
7 there something less you have to prove? Who is going to take
8 that question?

9 **MR. BORNSTEIN:** So I could take that, Your Honor.
10 Mr. Bornstein.

11 The elements of the Cartwright Act claim, in our view, do
12 not completely overlap with the Sherman Act claim. I will say
13 I anticipate the next question that you will ask would be for
14 me to explain how they are different, and I apologize in saying
15 I was not prepared and am not prepared to cover the precise
16 differences between the two right now, and I'm sorry about
17 that.

18 But in putting the claims together, we did assert both
19 because in preparing the Complaint, we were of the view that
20 although there is some meaningful overlap between the two, that
21 they are not precisely the same.

22 **THE COURT:** Okay. Hence my desire to have this
23 framework all tidied up in January, is what I'm looking for.

24 **MR. BORNSTEIN:** Understood.

25 **THE COURT:** Now, with respect to the unfair

1 competition claim under 17200, you alleged in your Complaint --
2 and this is Count 10 -- that the unlawful prong -- and as you
3 know, there are three prongs under 17200 -- that the unlawful
4 prong is tied to the Sherman Act and the Cartwright Act, which
5 is appropriate because you have to tie them to some statute,
6 but with respect to the unfair prong -- and Apple didn't bring
7 a motion on this, and I appreciate the -- not having yet
8 another motion, so I'm not asking Apple to do it, but I do want
9 clarity.

10 With respect to the unfair prong, as you may recall, under
11 California law, there are two standards. The first standard is
12 for claims brought in the context of consumer claims or by
13 consumers. You don't fall into that -- well, maybe you are
14 going to argue you are a consumer. I don't know. But the
15 second prong relates to harm to the consumers relative to the
16 defendant -- utility of the defendants' practices.

17 So, again, it seems to me with respect to the unfair
18 prong, I want to have a clear understanding of where you think
19 the overlap is with all of the other claims that you are
20 bringing. Do you have a perspective now?

21 And it would be helpful, actually -- you know, when I was
22 preparing for today, I thought immediately that the first
23 standard didn't apply, but then as I was saying -- as I was
24 articulating it to you just a moment ago, if you're going to
25 claim that you're a consumer of these goods or of the platform,

1 then perhaps I'm -- I was not right in my first assumption that
2 the first standard doesn't apply. If it does, then you do have
3 to tether it to a constitutional, statutory, or regulatory
4 provision, and I need to know in advance where the tether is.

5 **MR. BORNSTEIN:** Understood, Your Honor. And we will
6 in -- either in putting together the document that Your Honor
7 has asked the parties to put together or sooner, if it would be
8 helpful to the Court, we will make that clear. That said, I
9 apologize. I was not expecting to dive into the UCL claim on
10 this -- on this conference, and I don't want to step outside
11 the lines here.

12 **THE COURT:** Okay. That's fine.

13 The other component of that, right -- so I want to know
14 elements of proof for each. I want to know where the overlap
15 is, whether something rises and falls with certain claims.

16 The last piece of it is remedy. I want to understand what
17 remedy you are seeking for each one of these claims and if
18 they're different or if they're the same.

19 The remedy section of your Complaint is pretty broad and
20 pretty vague. To the extent that you are seeking for me to in
21 effect dismantle the platform, then I want to know again in
22 advance where that authority comes from and to the extent that
23 there are other courts that have imposed such sanctions or such
24 remedies, I'd like to have copies of those orders.

25 So, again, you know, this is not an insignificant case.

1 I'd like to be able to think about it and mull about it, and
2 certainly, again, the framework doesn't relate to the facts so
3 I think I -- having it in January is probably sufficient.

4 **MR. BORNSTEIN:** Yes, Your Honor. On that point, I
5 think I can -- if it's helpful now, I can provide a little bit
6 more context.

7 I expect that there may be some disagreement about the
8 characterization between the parties, but it is not our
9 expectation that were we to prevail in the case, that we would
10 ask Your Honor to dismantle the entirety of the iOS platform.
11 We view this much more in the nature of a non-discrimination
12 order permitting other forms of payment processing, permitting
13 other forms of app distribution to happen on the platform.

14 I understand that there may be different perspectives from
15 the other side on whether or not that constitutes dismantling,
16 which is something we can have a spirited debate about in due
17 course, but we are not, in fact, looking for something that
18 goes as far as that, and we can provide the Court with examples
19 of similar non-discrimination orders to deal with antitrust
20 violations in other matters.

21 And I don't mean, to be clear, to cabin this to the kind
22 of non-discrimination-type cases, but I do think that's a
23 conceptual way of thinking about the kind of remedy that we
24 have in mind. It would permit Epic to compete as another
25 distributor. It would permit Epic to compete as another

1 payment provider.

2 **THE COURT:** Okay.

3 Apple's claims. You, too, have a number of claims. You
4 have seven. In this regard, I think they're much more
5 straightforward. I still think it's useful to have it so that
6 we don't have to deal with it later.

7 Again, I prefer for these to be joint submissions, and it
8 is fine with me if you format it like you would do proposed
9 jury instructions, you know, one per claim with arguments on
10 both sides underneath the authorities that you have for each of
11 the claims.

12 I know that there is a motion for judgment on Claim 4 and
13 5. I expect that I'll have some answer for you before the
14 submission deadline. If I don't, just include them, and then
15 we can eliminate them later.

16 I do have a question with respect to the prayer for
17 relief, and so this goes to either Ms. Richman or Mr. Perry.

18 In the prayer for relief, you ask for a decree that Epic
19 is in violation of the California Unfair Competition law, but I
20 don't see a 17200 claim alleged, so where does that come from?
21 What's the basis for the allegation?

22 Who wants to take that?

23 **MR. PERRY:** Your Honor, this is Mark Perry for Apple.

24 I hate to say this, but I believe that subparagraph H of
25 the prayer, the UCL references an artifact from a -- there

1 was -- we had drafted a UCL claim that we did not include in
2 the counterclaims, and I think the prayer did not get amended
3 in the final edit to pick that up.

4 **THE COURT:** Okay. Any objection to me striking that?

5 **MR. PERRY:** No, Your Honor.

6 **THE COURT:** All right. That is stricken, and I'll put
7 it in the order that comes out so that everybody knows.

8 Okay. With respect to the motion for judgment, as I
9 indicated to you, I don't anticipate having oral argument on
10 that. It will be ripe on October 23rd. A couple of points,
11 though, on that topic.

12 First is -- and this is a warning to the Apple lawyers.
13 You violated Rule 7-4(a) of the local rules. I don't tend to
14 fine violations so I'm not going to sanction you, and I'll ask,
15 after I tell you what the violations were more specifically --
16 ask Epic if they want you to refile it. But under that rule,
17 if you have a brief in excess of 10 pages, you need to give us
18 a table of contents and a table of authorities, a statement of
19 issues to be decided. None of that was provided. In addition,
20 your footnotes violated Rule 3-4(c)(2).

21 Everybody take notice. Footnotes need to be in 12-point
22 font. That's the rule. It's really easy for me to know you
23 violated this because it means when I see your briefs, I have
24 to get my glasses, so I can't read the 10-point without glasses
25 or without electronically increasing the size.

1 You seem to be well within your limits. Sometimes we have
2 found and I have stricken pages and/or footnotes when it's
3 clear that they're being used to exceed the page limits in a
4 brief. And I just strike it. So you're on notice that you
5 need to follow the rules. I'm not exactly sure why it is you
6 didn't follow the rules here, but it is a violation.

7 So does Epic want them to refile it with the appropriate
8 table of contents and authorities and the correct size font of
9 footnotes?

10 **MR. BORNSTEIN:** No, Your Honor. That's not necessary
11 to have done.

12 If I could make one request of the Apple lawyers, though,
13 it would be -- if you're able to electronically generate a
14 table of authorities, which you might be able to do since you
15 have a soft copy of the document, and just email that to us,
16 that would be very appreciated.

17 **MR. PERRY:** Your Honor and Mr. Bornstein -- this is
18 Mark Perry. That's my fault and I apologize. I thought we had
19 it right, and we didn't, and so thank you for the admonition.

20 We will refile. I think it's better to do it and to get
21 it right from the outset. That way you'll have what the Epic
22 folks need, unless that's an inconvenience for the Court. That
23 way everything in the file is correct, and we'll move forward,
24 and we will triple check on a going-forward basis.

25 **THE COURT:** That's fine. I like having a table of

1 authorities. It helps us, and it might matter with respect to
2 the next issue.

3 In my standing order, I -- and this is Rule 2(d). I will
4 consider having oral argument if the parties agree that a
5 lawyer with six years or fewer will do the argument. Many of
6 us on this Court believe that it is important to give younger
7 lawyers an opportunity for argument. We have fewer arguments.
8 We have fewer trials. And you can't become great advocates
9 without practice.

10 So if each side is willing to identify someone who is --
11 or two who are six years or lower out of law school, then I
12 would consider allowing them to argue that motion; otherwise,
13 it will be submitted on the papers.

14 So you can discuss it between yourselves. If that's
15 agreeable to you -- and it's obviously your call -- then send
16 us an email, and we'll put it back on the calendar when I can
17 get to it, but it's something that I try to do and I know some
18 of my colleagues try to do as well.

19 And otherwise, I just -- I think it's pretty
20 straightforward, so I was not planning on having argument. But
21 I think it is helpful for people to know that we have those
22 rules, so it's an opportunity for you.

23 Okay. As I read one of these statements, I saw that there
24 were issues with the Cameron case relating to the Foreign Trade
25 Antitrust Improvement Act, and this ties to what -- to my first

1 discussion with respect to getting a trial brief on the legal
2 framework.

3 One of the reasons why I related these cases is because I
4 want to make sure that I understand the whole playing field,
5 and that playing field involves what the Cameron plaintiffs are
6 doing and what the consumer plaintiffs are doing.

7 So what I think -- and I'll let those parties weigh in --
8 what I think would be helpful is that once the document that I
9 referenced earlier is filed, I would welcome or entertain what
10 I would call an amicus brief from the attorneys in those other
11 cases in case they believe that somehow that framework is not
12 accurate or right because I don't want to find out from them
13 that there's something wholly different or some different
14 perspective a year later when this case is resolved and it's up
15 at the Circuit and they're still litigating. You are all
16 experts in this field. Federal judges, by definition, are
17 generalists, but I have had my share of these cases, and I
18 understand that the impact is significant, and it would be
19 helpful to make sure that I'm not missing something.

20 So let's see. Who do I have? Ms. Byrd? Mr. Lopez? Who
21 would like to weigh in.

22 **MR. LOPEZ:** So, Your Honor, since you've raised the
23 FTAIA issue, I believe that's unique between the class cases to
24 the developer case, but Ms. Byrd can weigh in if I'm incorrect
25 about that.

1 But, yes, that's correct. There is an issue between us
2 and Apple with regard to that, and in brief, it stems from our
3 belief that the transactions at issue here for the developers
4 are between U.S. developers on the one hand and a U.S.
5 corporation on the other hand which is selling distribution
6 services to the developers, and so in our view, the FTAIA does
7 not apply at all, but in the unlikely event that the Court
8 should determine otherwise, we think that the exception applies
9 in terms of the impact on domestic commerce because, again, it
10 is U.S. developers that we represent and it's U.S. developers,
11 in our view, who have been overcharged, regardless of where the
12 corresponding retail sales have occurred.

13 Very briefly, what that means is that Apple operates the
14 App Store via -- I think it's about 175 or 176 storefronts
15 today, so the U.S. storefront is one on the retail side and
16 then you have storefronts in India and Mexico and various other
17 countries. Regardless of all that, again, our claims are based
18 on the sale of distribution services.

19 **THE COURT:** And then do you have a perspective about
20 weighing in on the --

21 **MR. LOPEZ:** Yes. Yes. And we very much welcome the
22 opportunity, Your Honor, to file the brief along the lines that
23 you've suggested. We anticipate doing that not only on this
24 issue but probably others. We've been monitoring the
25 proceedings in Epic very carefully, and we contemplated asking

1 the Court for leave to file an amicus brief in the preliminary
2 proceedings there, but we decided that since merits were not at
3 issue there, that we would defer on that. But we very much
4 welcome the opportunity to write. And if other instances come
5 up where merits are brought before the Court for some reason
6 other than this, then we anticipate going to the parties,
7 asking for their okay to file, and then if not, in either
8 event, asking the Court for leave to file something.

9 **THE COURT:** All right.

10 Do any of the parties have any concerns? Sounds like "no"
11 from Mr. Perry.

12 **MR. PERRY:** No, Your Honor.

13 **MR. BORNSTEIN:** No, Your Honor.

14 **THE COURT:** Okay.

15 Ms. Byrd, do you want to weigh in at all?

16 **MS. BYRD:** Yes, Your Honor.

17 To the extent that there are merits issues that are
18 briefed for the Court, we would also like the opportunity to
19 seek leave to file an amicus brief to the extent that it
20 overlaps with the issues in the consumer case.

21 **THE COURT:** Okay.

22 All right. So I am thinking about filing by January 22nd.
23 Does that work for everybody? And then the amicus would come
24 afterwards, maybe two weeks or a week. I don't know what you
25 need.

1 But on the first instance, does January 22nd sound like a
2 doable deadline?

3 **MR. BORNSTEIN:** It does, Your Honor.

4 **MR. PERRY:** Yes, Your Honor.

5 **THE COURT:** Okay. Great.

6 And then do the plaintiffs in the other related cases want
7 one week or two?

8 **MR. LOPEZ:** Your Honor, we'd appreciate two, but we
9 will do whatever the Court asks of us.

10 **THE COURT:** Two weeks is fine.

11 **MS. BYRD:** Thank you.

12 **THE COURT:** Okay. I'm going to move to discovery. Is
13 there anything on anything we've talked about so far that you
14 want to discuss?

15 **MS. RICHMAN:** Your Honor, would you like to hear from
16 Apple today on the FTAIA issue?

17 **THE COURT:** Well, what I understood is that with
18 respect to the Cameron plaintiffs at least, you had all reached
19 an agreement that they weren't going to be an issue in that
20 case, and then with respect to the consumer case, you were
21 still meeting and conferring on that topic.

22 **MS. RICHMAN:** That's correct, Your Honor.

23 **THE COURT:** I'll let you keep meeting and conferring,
24 and I'll weigh in when I need to weigh in.

25 **MS. RICHMAN:** Understood, Your Honor.

1 **MR. LOPEZ:** Thank you, Your Honor.

2 **THE COURT:** Okay. Let's move to discovery.

3 I'm referring discovery to Magistrate Judge Tom Hixson.
4 For those of you who do not regularly litigate in this
5 district, I believe our magistrate judges are what we call the
6 gold standard. Most of them, if not all of them, could be
7 district judges themselves. They have -- and the reason why we
8 have such high quality magistrate judges is because they are on
9 the wheel for all cases and they keep their own caseloads and
10 they help us with our substantial load.

11 Magistrate Judge Hixson was Harvard/Harvard, magna cum
12 laude at both, and he was chair of the California State Bar
13 Antitrust Section, so he is very well-versed in these issues.
14 He has been working with the Cameron and consumer class lawyers
15 and is well suited to work on the Epic/Apple case as well.
16 Okay. So that reference is made.

17 I started off earlier saying that we need to be focused
18 and efficient. You cannot re-litigate issues where you've
19 received the benefit of what has happened in the related
20 actions. So I understand that Epic has received millions of
21 documents as a result of work that was already done in the
22 other cases. To the extent that you are contemplating
23 re-litigating work product and attorney-client privilege, you
24 may not. If you think you want to do that, then issue new
25 discovery, wait for them to respond, and go through that

1 process and waste all that time. I have to tell you that if it
2 was good enough for the Cameron and consumer plaintiffs, it's
3 good enough for you, at least at this juncture.

4 Now, I'm not going to deny you your right to litigate
5 these things if that's where you want to waste resources, but
6 you're going to do it on your own nickel, so to speak, and on
7 your own time frame, and you're going to start from the
8 beginning. So you do not get an advantage to re-litigate
9 things in this case.

10 Is there any questions about that framework?

11 **MS. MOSKOWITZ:** Your Honor, this is Lauren Moskowitz.
12 If I may just make a request in conjunction with that.

13 We certainly don't intend to waste resources and
14 re-litigate agreements that have been reached. We would like
15 to know what agreements have been reached or what narrowings or
16 limitations Apple has imposed, whether unilaterally or by
17 agreement.

18 The Cameron plaintiffs -- we did coordinate and discuss
19 with them, and they're not aware of agreements that have been
20 reached, so there may be a disconnect there. It's really
21 transparency we're looking for so that we can understand where
22 the lines were drawn so that we can avoid serving duplicative
23 requests or trying to go down a path that we may very well
24 agree was reasonable.

25 **THE COURT:** Okay. What do you want me to say? Who

1 wants to respond?

2 **MS. RICHMAN:** Your Honor, I can respond for Apple.

3 We have made very fulsome productions pursuant to, you
4 know, extensive discovery requests from both the class -- the
5 developer class and the consumer class plaintiffs. You know,
6 there is a coordination order that we believe governs the Epic
7 case, and it has already been entered by Your Honor, which
8 requires the exact sort of efficiency that you have described.

9 We think it makes sense to have a single ESI stipulation
10 binding all of the cases. We think that the parties need to
11 avoid serving duplicative requests for documents. And we will
12 be transparent with the Epic plaintiffs on, you know, what
13 we've done so far.

14 We have not, you know, unilaterally made decisions to
15 limit the scope of our production. We've negotiated custodians
16 with the class plaintiffs, and Epic has that information. And
17 we're, you know, standing by and happy to discuss with them the
18 process by which we've reviewed and produced those documents.

19 **THE COURT:** Ms. Moskowitz.

20 **MS. MOSKOWITZ:** I'm happy to hear that, Your Honor.
21 We never did hear what the custodians were. We had to figure
22 it out for ourselves in the metadata, notwithstanding multiple
23 requests, so I'm happy to hear Ms. Richman say that we will be
24 getting transparency because I think that is the way forward
25 and that that is the way to coordinate, and we have every

1 intention of coordinating with the class plaintiffs on the
2 discovery that has taken place to date. We understand the time
3 crunch.

4 **MR. SIEGEL:** Judge Gonzalez Rogers, may I speak?

5 **THE COURT:** You may.

6 **MR. SIEGEL:** Okay. Thank you.

7 I would say on behalf of the Cameron plaintiffs that there
8 is a lot of ongoing meeting and conferring and some discovery
9 disputes, and it would help us as well if Apple has identified
10 agreements that they believe limit the discovery of Epic into
11 our case to see those as well because we're not exactly sure
12 what Epic is referring to. I mean, specifically with the
13 custodians, Ms. Richman says that custodians were decided, but
14 those are still subject to ongoing negotiations, and we have a
15 few more custodians we'd like to add.

16 So I think many issues are still open, so I do think it
17 would help if Apple identified the agreements they think limit
18 discovery. It would help all the parties.

19 **THE COURT:** Ms. Richman.

20 **MS. RICHMAN:** Your Honor, I'm not sure what agreements
21 they are referring to. We've produced documents pursuant to
22 the negotiated document -- requests for documents that have
23 been served in this case. We've used technology-assisted
24 review. We've discussed and negotiated that process with the
25 plaintiffs ad nauseam. It's -- there is no secrets.

1 We served initial disclosures, and, you know, we --
2 there's -- we've provided Epic, as I said earlier, with copies
3 of all of the requests that have been made on Apple and our
4 objections and responses thereto.

5 To Mr. Siegel's concern about staying in the loop on the
6 Epic discussions, that's provided for in the coordination
7 order. There is a specific provision of that that deals with,
8 you know, coordination of discovery among the related cases of
9 which Epic is now one. I believe that's at ECF Docket No. 80
10 in the Pepper case -- I'm sorry -- it must be in the Cameron
11 case.

12 **THE COURT:** I take it that when you have met and
13 conferred over discovery, you have reached certain agreements
14 when there is a dispute, and that tends to be memorialized by
15 email and/or letter; right, Mr. Siegel?

16 **MR. LOPEZ:** Your Honor, this is Rob Lopez for the
17 developers.

18 Correct. However, there are several ongoing, what I will
19 call, meta issues between the parties that persist, and those
20 go to certain categories of documents and data. For example,
21 right now, we continue to meet and confer over final production
22 of a very large revenue side transaction database and the form
23 that that will take. We've had back and forth on that. We're
24 not resolved yet. It's very important to all parties here, I
25 think.

1 Another meta issue is dealing with costs and revenue
2 documents, including many instances where we're not sure
3 exactly what has become of certain documents that seem to be
4 linked from other documents but we haven't seen in the
5 production.

6 And then, again just briefly, as far as custodians go --
7 Mr. Siegel raised this issue as well -- very early on Apple
8 provided us with a list of proposed custodians. We asked for
9 supplementation. Provided evidence at that time without having
10 seen the documents yet that we thought supported additional
11 custodians, including Epic custodians like Mr. Cook and the
12 archivist for Mr. Jobs, and Apple declined to add those at the
13 time.

14 So what we indicated to Apple is that all right, this is
15 an iterative process. We will go through and look at the
16 documents, find additional support.

17 That's where we are now, so that matter remains in flux.
18 But as the Court observed, yes, of course, there are certain
19 instances where the consumers have said we'll stand down for
20 now, but really because we have been so embroiled, all the
21 parties, in discovery, there are very many open issues, I'd
22 say, and I think Epic is probably going to want to get involved
23 in the resolution of those.

24 As Ms. Richman has said, she believes that's indicated by
25 the coordination order, and, you know, I think that's probably

1 what will have to happen, is we try to resolve some of these
2 issues to the extent that they overlap with Epic's claims.

3 **MS. RICHMAN:** Your Honor, may I respond?

4 **THE COURT:** Go ahead.

5 **MS. RICHMAN:** Just a couple of things.

6 One, I think, you know, on the class discovery, the
7 heads-up here is we have been in discovery for about a year now
8 and have not brought a single dispute to Magistrate Judge
9 Hixson. We've been able to compromise, you know. Apple did
10 not get everything it wanted. I don't think the class
11 plaintiffs have gotten everything that they've wanted, but
12 we've been able to meet in the middle thus far.

13 There are ongoing negotiations and disputes. It will not
14 shock you to hear I disagree with Mr. Lopez's characterization
15 of them.

16 On custodians, we have not heard from March 5th about
17 additional custodians until September 14th, so that is, you
18 know, water under the bridge. We've undertaken enormous effort
19 at reviewing documents for 15 custodians. We've produced
20 millions and millions of documents, as Your Honor has noted,
21 and it wasn't a document dump on July 31st. There were several
22 productions that preceded the final production for substantial
23 completion.

24 So we're happy to talk to the class plaintiffs about
25 custodians, but I don't know who they are sitting here right

1 now, other than the -- the ones that Mr. Lopez has just
2 identified.

3 On transactional data, Apple has invested enormous
4 resources in making sure that the production of tens of
5 billions of files is smooth and that we only have to do it once
6 because it is a very difficult process that's required
7 extensive engineering. We've been responsive to the -- the
8 plaintiffs' requests. These questions are highly technical in
9 nature. They're not the sort of things that the lawyers have
10 answers to; that we've been working with the business very
11 closely to respond to, you know, the long list of questions we
12 got from plaintiffs. We've produced a hundred million rows of
13 data in September at the plaintiffs' request in the format that
14 the plaintiff asked for.

15 So we are still underway with the discussions, but I
16 think, you know, that process will hopefully reach a conclusion
17 very soon.

18 On the links and the missing documents that Mr. Lopez
19 referred to, these are not links that link to, you know, some
20 sort of data repository. They are links for file transfers,
21 and they are transitory in nature. The documents are
22 transferred with the links and then, you know, edited or what
23 have you by the recipient.

24 We have been working with the plaintiffs where they've
25 identified links to documents that they think are responsive,

1 most -- you know, mostly related to the costs and expense
2 issues. We've been working with the plaintiffs to identify
3 those documents, and we're still doing that, but we made a
4 significant production in September with many of those
5 documents.

6 So, again, another example of where we are in the
7 meet-and-confer process and the continued cooperation by Apple.

8 **MR. LOPEZ:** Your Honor, may I respond briefly?

9 **THE COURT:** Well, I'm not going to let you, Mr. Lopez,
10 because I don't think it matters right now. It's not actually
11 ripe, unless you want me to do something today.

12 **MR. LOPEZ:** Well, actually -- I'm sorry.

13 **THE COURT:** Go ahead.

14 **MR. LOPEZ:** Sorry, Your Honor. Pardon me. The
15 technology is getting in the way of us.

16 The only thing I was going to say, Your Honor, is yes, you
17 know, we've tried to catalog and give a list of what we think
18 are the ongoing disputes, but what's, I think, particularly
19 germane today is, as we noted in our papers, we have a
20 disagreement with Apple about whether or not it went past the
21 substantial completion deadline in terms of some important
22 categories of materials, including cost and expense documents
23 and in particular, with respect to how the transaction database
24 is going to be produced and some particulars there along with
25 other matters.

1 So we proposed to Apple recently -- and we noted this in
2 our last Joint Case Management Statement -- that the parties
3 agree to propose to the Court that we extend the deadline for
4 class cert motions by about two and a half months, something
5 like that. We were thinking of April 16. In part it's due to
6 what happened with the timeline from our standpoint because we
7 believe that the plaintiffs have been prejudiced as a result of
8 what's happened, you know, in discovery, but also obviously
9 Epic has now entered the scene, and we think there are
10 efficiencies to be achieved because Apple, you know, naturally
11 has insisted all along that it wants its representatives to be
12 deposed as infrequently as possible, preferably only once, and
13 Epic is going to need time to get up to speed.

14 So whereas we could begin depositions sooner, I think if
15 we're going to try to achieve the efficiencies that the Court
16 spoke to earlier and that I'm guessing Apple wants, I think it
17 makes sense to give Epic some time to catch up and see what we
18 can do to coordinate depositions, and an extension of the
19 deadline --

20 **THE COURT:** I think that --

21 **MR. LOPEZ:** -- would help with that.

22 **THE COURT:** I think that there isn't much objection to
23 that; right? That is --

24 **MR. LOPEZ:** Well, we --

25 **THE COURT:** -- if Apple wants -- I mean, if there are

1 going to be coordinated depositions, I don't remember reading
2 that Apple objected to a continuation of the class cert
3 briefing in the other cases.

4 **MR. LOPEZ:** Well, we were surprised to hear late in
5 the afternoon on Friday that Apple was declining our request,
6 and part of the reason we were surprised is because there was a
7 call on Wednesday in which the only expressed concern -- my
8 understanding -- I was unable to attend the call -- was that
9 Apple was concerned about its experts being doubly tasked with
10 regard to class cert and what was going on in the Epic case,
11 but it wasn't indicated to the folks on the phone that Apple
12 would decline. They were still going to think about it, and
13 they said no Friday afternoon.

14 **THE COURT:** Mr. Perry, Ms. Richman, who is going to
15 speak on that?

16 **MR. PERRY:** I will, Your Honor. Mark Perry for Apple.
17 This came up after the Case Management Statement was
18 filed, Your Honor. We had a meet-and-confer with the
19 plaintiffs in which the expressed concern was the integration,
20 if you will, with the Epic schedule.

21 We have studied the Epic schedule and the combined
22 schedule very carefully, as we think the Court did as well when
23 ordering it. Apple can do the combined schedule as currently
24 ordered in all cases. It works fine. The pieces actually sync
25 up pretty well with respect to the various deadlines, and it

1 would get class certification briefing fully done about three
2 weeks before the trial starts so that the experts can turn
3 their attention to the trial.

4 We do oppose the extension because what the class
5 plaintiffs are proposing would put class certification motions
6 right before trial, essentially making the experts who would be
7 appearing at the Epic trial have to oppose a class
8 certification motion simultaneously and basically throwing
9 havoc into the schedule that is already there.

10 We didn't hear any of this when the Epic schedule was
11 being proposed -- you know, the various Epic schedules were
12 being proposed, and as I said, we can live with the schedule as
13 it is. So that's the reason.

14 **THE COURT:** So, Mr. Lopez, I can tell you that when I
15 put the schedule in place, I had your schedule in mind, and I
16 thought it would behoove the Court to have all of that briefing
17 in so that when I started this discussion, you know, I want to
18 understand the landscape.

19 That's not to say that an extension might not be
20 appropriate. I don't know. What you're claiming is that the
21 extension is appropriate for two reasons: One, because of some
22 delay, and, two, because of coordination with depositions. So
23 we can talk about those two aspects.

24 But I will tell you that I anticipated it being done so
25 that when I went into trial on this particular piece, I would

1 have the full scope of your class certifications in mind, and
2 as you know, for class certification, it's not the be all and
3 end all. We do have -- we do look at merits to some extent,
4 but as your firm knows, in the *Batteries* antitrust case, I gave
5 you multiple opportunities to go and revise and refine your
6 class certification motions. So it's not -- it's not the end
7 game for you.

8 With respect to whether or not there's prejudice, I'd have
9 to wait to see what Judge Hixson says on that topic. I don't
10 know if there has been prejudice or not, and I haven't gotten
11 into the nitty-gritty to figure that out. But I also haven't
12 heard whether -- how depositions impact either one of these
13 issues.

14 So where do we stand on depositions, and are they going to
15 be deposed twice, etc.?

16 **MR. LOPEZ:** Well, we're certainly willing to work with
17 the parties to try to avoid that where we can without
18 prejudicing our interests, but of course there are three cases
19 in play now that are quite different from one another, and so
20 we're going to need adequate time to do what we need to do, and
21 right now the coordination order calls for, I believe, ten
22 hours when there's a joint noting of a deposition, and that may
23 need to be revised, at least in our view, or at least ask the
24 Court to consider that given Epic's entry onto the scene.

25 But just specifically with regard to what Mr. Perry said,

1 my understanding is that we offered to accommodate its experts'
2 issues by agreeing to extra time for an opposition if that was
3 agreeable to the Court, but beyond that, we have been noting in
4 meet-and-confers with Apple in our Case Management Statement,
5 the one preceding this one and this one, that we believe that
6 prejudice had accrued to the plaintiffs, and, you know, some of
7 that is very substantial in terms of class certification; for
8 example, with regard to cost and expense documents because they
9 tell us there's no central database, and also due to this very
10 large revenue side database that still is not produced because
11 we still have not agreed to the form of production. Apple
12 insists that it will only produce it once, and so we've been
13 working very hard with our consultants to get the parameters of
14 that right the first time, not because we agree that Apple can
15 unilaterally decree that when we haven't seen it yet, but
16 because we want to work efficiently and we're mindful of COVID
17 and all the difficulties that has imposed.

18 And, by the way, that's another reason why I think we are
19 where we are. All the parties have worked hard on this, but
20 there have definitely been some inefficiencies that have come
21 in because of COVID.

22 Just to shorten this up, I do believe that an extension is
23 appropriate, you know, not only on the basis of depositions but
24 also on the basis of the prejudice that we think has accrued.

25 **THE COURT:** I'm not going to give you an answer today

1 because I don't have enough information. So I think -- it's,
2 you know, October 19th. If there's an issue with respect to
3 production that you need to have compelled, you need to get to
4 Magistrate Judge Hixson, and then I need to have a conversation
5 with him about whether or not there's prejudice.

6 With respect to depositions, I don't know what you need.
7 I don't know if there -- if Apple's going to object to doing
8 things multiple times, then they have less of an argument with
9 respect to a continuance or at least with respect to opposing a
10 continuance. So I need -- in order to be fair, I need more
11 specificity.

12 **MS. MOSKOWITZ:** Your Honor, may I be heard briefly
13 just for Epic on the depositions question?

14 **THE COURT:** You may.

15 **MS. MOSKOWITZ:** Thank you, Your Honor.

16 The fact of the matter is that Apple just recently
17 produced the almost 3.7 million documents. We just got those
18 last week. We do understand that 2.3 million of those
19 documents are actually junk. They're just auto-generated
20 emails that can just be moved to the Recycle Bin, but it's
21 still over a million documents, well over a million documents
22 that we will have to go through.

23 Apple has also identified additional custodians that it
24 recognizes are relevant to our case. There are a whole host of
25 issues, for example, in-app purchases that are not squarely in

1 the developer class action but are obviously central to our
2 case, so there is a number of additional documents that Apple
3 recognizes they need to produce. They haven't started that yet
4 either, but to the extent that there are overlapping
5 depositions, we just -- we understand developer plaintiffs are
6 going to need to get going, and we're not going to be able to
7 join those depositions if they're starting to happen imminently
8 just by virtue of the fact that we just started getting
9 documents from Apple. So I think it does really --

10 **THE COURT:** I understand that, and that's why I said
11 Apple can't have its cake and eat it, too. You can't both say
12 that you want depositions coordinated and that you oppose a
13 continuance. Well, actually you could, but you're not very
14 persuasive if that's what you do.

15 I also say -- hold on, Ms. Moskowitz, since you jumped in.
16 You know, Epic has to get on the ball itself with its
17 production. It doesn't come into this looking very good given
18 its failure to produce in response to the third-party subpoenas
19 months ago.

20 And is it true -- is it true that you didn't give ESI with
21 respect to Mr. Sweeney? Is that accurate? That's astounding
22 to me.

23 **MS. MOSKOWITZ:** Your Honor, that is not accurate,
24 Your Honor. In response to the subpoena specifically, separate
25 and apart from productions that we have already started to make

1 in the Epic vs. Apple case but specifically in response to the
2 subpoena, it is correct that we did not do a custodial email
3 collection. Apple was well aware of that. They had themselves
4 memorialized that understanding back in July. So we were doing
5 a document sufficient to show and policies and guidelines type
6 production in response to the subpoena. We did that.

7 We also at the same time, Your Honor, on October 7th began
8 our rolling production of ESI, including those from
9 Mr. Sweeney. So to date, including a production last week, we
10 are 30,000 documents and 125 pages into our production, and we
11 are going to continue to roll productions. We have every
12 intention of facilitating the expeditious resolution of this
13 case, and we are getting documents out on a rolling basis.

14 **THE COURT:** Is it also true that you're fighting
15 providing documents regarding malware on games distributed
16 through your marketplace?

17 **MS. MOSKOWITZ:** In connection with the subpoena,
18 Your Honor, that was the state of play, but we are not going to
19 be restricting our searches or excluding documents returned by
20 our searches that touch upon those issues, and we did make
21 clear that we wouldn't be withholding such documents in
22 connection with our ESI collection and production.

23 So we have shared with Apple our custodian list, our
24 search terms, and how we are going to be producing documents.
25 We just on Friday received a lengthy document request from

1 Apple. We are happy to meet and confer with them if they have
2 questions about our protocol, but we will not be withholding
3 documents that touch upon those issues, Your Honor.

4 **THE COURT:** The other thing, Ms. Moskowitz -- and I
5 said this to your colleague in the other Epic case that I have
6 with respect to the minors' lawsuit against Epic -- that I
7 expect that Epic better not be dragging their feet on that
8 case. That case charges Epic with not having sufficient
9 parental controls in place and as a consequence, harming
10 minors. I don't know where that case will ultimately lead, but
11 it is one of the issues that Apple at least has commented on in
12 its defense of this case.

13 So I have told Magistrate Tse, you know, that just as
14 if -- just as if -- as Epic is pushing for productions in their
15 case as the plaintiff there where they're a defendant, you're
16 not going to be given any quarter if you're not pushing out
17 discovery for those plaintiffs in that case given some of the
18 overlap that happens.

19 Now, I'm not sure that I will ultimately see it, but
20 issues do arise and class certification happens and everything
21 else. So you on your side, you can't have your cake and eat it
22 too either, so you're on notice.

23 **MS. MOSKOWITZ:** Understood, Your Honor. Thank you.

24 **MR. SIEGEL:** Your Honor, can I apply some specifics
25 that I think will help with the deposition issue? It is on

1 pages 1 and 2 of our Joint Case Management Conference
2 Statement. We have quoted Apple counsel at the preliminary
3 injunction hearing at page 98 of the transcript. This is
4 Apple's quote: "Epic proposes that all depositions take place
5 between January 4th and February 5th, whereas we, Apple, would
6 extend that by about three weeks." And our class certification
7 motion is due on February 3rd. So if Apple is thinking that
8 depositions are going to start a couple weeks after
9 January 4th --

10 **THE COURT:** Mr. Siegel --

11 **MR. SIEGEL:** Yeah. Sorry.

12 **THE COURT:** -- unless you -- look, I just said a
13 moment ago that I instructed Apple -- I told Apple they can't
14 have it both ways. It sounds to me the state of play right now
15 is as soon as this is done, you need to meet and confer again,
16 and then I'll hear back from you over this request for an
17 extension.

18 **MR. SIEGEL:** Yes, Your Honor.

19 **THE COURT:** You're not going to negotiate in front of
20 me, I guarantee you. I don't have that much time.

21 **MR. LOPEZ:** Your Honor, just briefly with respect to
22 what the Court has just said then and a suggestion I made
23 earlier that we may need to bring this to Judge Hixson in some
24 regard and then he would be in a position to apprise the Court
25 of any prejudice -- one request that I would make is I don't

1 want to surprise the Court, but I believe that we can already
2 with the consumers make a good case for an extension. We may
3 not need to go before Judge Hixson to do that. So what I'm
4 wondering is would it be all right with the Court if we did
5 file an administrative motion pursuant to the Court's standing
6 order that contemplates --

7 **THE COURT:** I don't want a motion until I have dueling
8 lists of depositions, so are they going to be together or not,
9 and if you even mention the failure to produce millions of
10 documents, then that has to go in front of Judge Hixson first.
11 So you cannot bring that motion without having certainty on
12 those two topics. Okay.

13 As I saw, there are some agreements regarding discovery
14 that are in this Case Management Statement. By Friday, I want
15 you to lift those out of the statement, make any revisions you
16 need to make, and send it in the form of a proposed form of
17 order so that I can sign it and we can -- it can be on the
18 docket. Okay?

19 Mr. Perry, Apple just got served in Pistachio -- actually,
20 before I go there, anything else -- any more guidance that you
21 want on these discovery issues?

22 **MR. PERRY:** Not from the Apple side, Your Honor.

23 **THE COURT:** Mr. Lopez?

24 **MR. LOPEZ:** Sorry. I had trouble unmuting myself.

25 No. I think I understand Your Honor. I don't want to

1 show any disrespect to the Court. That would not be my
2 intention at all. I think I understand what the Court wants us
3 to do in terms of surfacing whatever issues there may remain
4 with regard to production still to come.

5 My only point would just be that again we think that given
6 what's already happened, prejudice has accrued, but I think we
7 understand the Court's instructions.

8 **THE COURT:** All right.

9 Ms. Moskowitz?

10 **MS. MOSKOWITZ:** No, Your Honor. Thank you.

11 **THE COURT:** Okay. Other things that I had out there.

12 This new case, Pistachio vs. Apple, is there going to be a
13 request for me to relate that? Have you had those discussions?

14 Mr. Perry, where do you stand on that front?

15 **MS. RICHMAN:** I can field that one, Your Honor.

16 We have touched base with the consumer plaintiffs on the
17 question of relation because Apple does intend to file an
18 administrative motion to relate. My understanding is that the
19 consumers will not be joining that motion, but they will not
20 oppose it. We were --

21 **THE COURT:** Let me go to Ms. Byrd.

22 **MS. BYRD:** Yes, Your Honor.

23 We will not oppose a motion to relate. We believe it
24 appears to be related and actually subsumed within the consumer
25 case. In terms of the class definition and the market, it's a

1 subset of our case.

2 **THE COURT:** That case was filed by the Saveri firm; is
3 that right?

4 **MS. BYRD:** I think it was Berman Tabacco --

5 **THE COURT:** Todd Seaver. Have you had any discussions
6 with Todd Seaver?

7 **MS. RICHMAN:** Not yet, Your Honor.

8 **MS. BYRD:** No, Your Honor.

9 **THE COURT:** So you're not joining, but you're not
10 objecting?

11 **MS. BYRD:** That's right. We didn't see any reason to
12 join in the motion, but we're not going to oppose it. We agree
13 that it's related.

14 **THE COURT:** The only reason to join is that that means
15 when I get it, I can approve it. If you don't join, then I
16 have to wait five days to approve it.

17 **MS. BYRD:** Okay. Well, in that case, then we can join
18 in it. That's fine.

19 **THE COURT:** Okay.

20 So, Ms. Richman, when you make that motion, just put that
21 there is a joinder, unless no one objects, and -- well, I guess
22 the -- I guess the plaintiffs in that case have a right to
23 notice, so I'll make a note that there is no opposition from
24 this side. And I don't see Mr. Seaver listening in; otherwise,
25 I would bring him in. Okay.

1 It is important to me that -- one of the requirements of
2 the CMC statement, the very last one, is that everybody read
3 and agree to abide by the Guidelines for Professional Conduct
4 for the Northern District of California. I know you said that
5 you did, but I am looking to all of you to make sure that
6 everyone on your team does in fact, so when I was a state court
7 judge, I used guidelines for professional conduct in my
8 courtroom. When I became a federal judge, there were none
9 here.

10 My first MDL, which was the *Batteries* case -- in that MDL,
11 I had the lawyers, the antitrust lawyers from all the big
12 firms -- so, you know, we had -- well, there were lots of them,
13 and there are still lots of them -- write these rules
14 themselves. I said, "I am told that you are some of the best
15 lawyers around. I want you to write a set of rules that you
16 can live with." And I gave them lots of examples of lots of
17 different guidelines.

18 The lawyers in that MDL wrote the rules, and I issued an
19 order enforcing -- having those be the guidelines for that MDL.
20 The Northern District then -- we requested that the entire
21 Northern District adopt them, which it did. So this is from
22 the lawyers, so I know they are reasonable.

23 Make sure you read them and make sure you abide by them.
24 Okay? You should know, because many of you have not practiced
25 in front of me, I will sanction. I think it's fine to be a

1 zealous advocate, but that does not include ad hominem attacks,
2 that does not include not being professional. I have seen too
3 many litigators leave the profession because of the nastiness.

4 I will read emails when you least expect it. I will read
5 deposition transcripts when you least expect it. And I have
6 sanctioned big-firm lawyers for instructing people not to
7 answer when it was not appropriate in a deposition. And I have
8 sanctioned lawyers for being nasty in emails. So I would
9 suggest -- and I'm not saying -- I have no reason to believe
10 that anybody on this platform acts like that, but I am warning
11 you because this is a very litigious case, and when you are
12 tired, things happen. So you're on notice. And make sure your
13 teams are on notice. Okay? Any questions?

14 Terrific.

15 On your list, you wanted to talk about Zoom accessibility
16 issues.

17 **MR. BORNSTEIN:** Your Honor, if you were looking for
18 one of the parties to address it, this is an issue about which
19 we have met and conferred, so I think I am speaking for the
20 group here in saying that the platform has been working very
21 well so far for those of us who have been invited in to these
22 sessions so that we can be heard personally, but for other
23 members of the team and in particular for our clients who would
24 like to be able to observe the proceedings, in the TRO session
25 and in the PI session, there were a number of people who simply

1 were not able to get on given the public interest in the
2 matter. I understand even that there have been some law school
3 classes that have been assigned to try to get in which has
4 taken up some of the bandwidth for the court. I understand
5 there is a limit to the size of the license.

6 So we don't unfortunately have a solution to propose to
7 Your Honor because we don't have the familiarity with the
8 platform and the restrictions the Court might be operating
9 under in its relationship with Zoom, but if there is some way
10 that the Court is able to facilitate a small number of
11 representatives from each of the parties to be able to
12 participate, we would be grateful. And if there is anything
13 that the parties can do to assist in that respect, we would of
14 course jointly be willing to facilitate that.

15 **THE COURT:** We were taken a little bit by surprise
16 with respect to the interest, and as you all know, these Zoom
17 platforms are all new. I think the Northern District has moved
18 pretty quickly as compared to others to do this as opposed to
19 phone access. Our biggest license is 500, and so for the TRO,
20 we had the 500 license. We, as you know, maxed out very
21 quickly, so for the second -- for the preliminary injunction,
22 we attempted to -- we attempted -- we have two 500 licenses, so
23 we attempted to join them to at least get -- to double our
24 capacity, and from a technology perspective, we were not able
25 to do that.

1 I can tell you that despite our warnings, they were
2 live-streamed by a number of people, and some of those
3 live-streams may still be out there on YouTube. We found
4 ourselves five. Some of them, it looked like lawyers. Someone
5 clearly didn't want to get in trouble. Immediately after it
6 was done, they closed the link, but there were others that at
7 least for a week or two were open, so I don't know -- I haven't
8 checked them so I don't know if they are.

9 Here's the problem. When I look at how many people access
10 those links for the PI hearing, there is 25,000 people. 25,000
11 people accessed those links. There is no way that we will be
12 able to get a license to allow anybody on a platform to deal
13 with those kinds of numbers.

14 This morning because we weren't sure what was going to
15 happen -- clearly there's not as much interest for a Case
16 Management Conference, which is fine with me. We have 80
17 people in addition who are watching. The other people who were
18 upset were press who couldn't get in as well.

19 So one of the things that I think we can do -- and we
20 weren't able to achieve it this morning, but I noted -- I
21 hadn't prepared until this weekend for this morning. That we
22 might be able to have at least a telephone link so that if
23 nothing else -- and we could give that just to the parties so
24 that if nothing else, people could at least hear because I know
25 your teams will probably be large any time we have a merit

1 hearing, so that might help.

2 But certainly, you know, we can offer some number of
3 people to be able to come on the platform. I wouldn't want to
4 take -- you know, I don't want to overwhelm it, but just like
5 if you were in a courtroom, you know, you might have your
6 client with you at the table, and so I think that that's
7 entirely appropriate.

8 When the press complained that we weren't providing
9 access, I did have to laugh given that, you know -- given 500
10 people who accessed and potentially 25,000 who accessed is so
11 much more than you would ever get in a courthouse, even with an
12 overflow courtroom. So I think that in many ways, we are
13 providing much more access than has ever been obtained. But
14 we'll try to figure it out. I understand it's an issue.

15 I don't quite understand how Zoom -- how their algorithm
16 works. I don't know which people -- how -- at what point in
17 time they start accumulating the 500, whether it's just random,
18 whether it's how early you try to click on. I have no idea,
19 and we don't have that information, so if you find that
20 information and that could inform our work, then we can do
21 that. But certainly I think we can try to provide you with a
22 couple more seats on the platform so that your clients can be
23 on.

24 **MR. BORNSTEIN:** That would be appreciated, Your Honor,
25 by all of the parties.

1 And I would say I recognize that the Court's technology
2 staff is probably extraordinarily stretched these days, as
3 we're all working in these circumstances, but we would be happy
4 to connect with someone if there is a point person at the court
5 who has responsibility for these matters. If we can be of
6 assistance to him or her, we would be happy to do that, but
7 obviously we don't want to put more work on that person, so
8 that's just an offer, not a request.

9 **THE COURT:** Well, if you have a proposal or an idea,
10 then let me know.

11 Yes, Mr. Perry?

12 **MR. PERRY:** I don't know if your license, Your Honor,
13 is the same as the corporate license, but in our system, we can
14 set up rooms so that, you know, you could have a Cravath room,
15 a Gibson Dunn room, a consumer plaintiffs room, and that's one
16 line each on the license, and then there is the public license
17 that everybody could dial into. Again, I don't know if the
18 court's license works the same way, but our IT people have
19 figured out how to do this when we have very large meetings.

20 Again, I have no idea personally, but if we could put the
21 IT people together, we might be able to figure out how to do it
22 on the Zoom -- and we use the Zoom platform daily.

23 **THE COURT:** I think the problem, Mr. Perry, is that
24 the room technology is the Zoom meeting technology, not the
25 Zoom webinar technology.

1 **MR. PERRY:** I see.

2 **THE COURT:** And here's the issue with that. All of
3 the press that you've seen about individuals who are watching,
4 kind of photobombing or doing chatbombing, those things happen
5 on the meeting platform, which is much more accessible than the
6 webinar platform, and so for security reasons, we have decided
7 that this is the safer platform because there are lots of
8 people out there -- and I can tell you every time we have one
9 of these hearings, my CRD, Ms. Stone, is, you know -- I've got
10 15 people who are raising their hands who want to be heard, and
11 she has to lower the hands, lower the hands, and, frankly, for
12 about a week or two after our hearings, they still come on the
13 platform and, you know, with a name like "Fortnite User" or
14 "Apple User" or whatever, raising their hand wanting to be
15 heard.

16 So this is a public forum, so to speak, but we do have --
17 but if you were in the courtroom and you were disruptive, the
18 court security officer would take you out of my courtroom. And
19 not -- we wouldn't have thousands of people watching what it is
20 you wanted to post in some chat feature, and so that's what we
21 are -- that's what we are protecting against, is the
22 disruptiveness that many courts have found happen when you're
23 on the meeting platform as opposed to the webinar platform.
24 And that webinar platform, like I said, doesn't have rooms.
25 It's not an option.

1 And it's one of the things that when we've thought about
2 doing virtual trials, in some way the meeting platform is much
3 nicer because you can have your witnesses waiting in a meeting
4 room and then bring them in when it's time, but they have
5 these -- you know, the downside is that you've got this ability
6 for others who are not parties to disrupt.

7 So if they can merge the two, that would be great, but I
8 haven't seen that yet.

9 **MR. BORNSTEIN:** Maybe I can suggest, Your Honor, that
10 the parties spend a little bit more time discussing with each
11 other having their IT people speak to each other, and if we
12 have any suggestions, we can communicate them to Ms. Stone. Is
13 that an appropriate way to proceed?

14 **THE COURT:** Yes. As long as -- sending a note to
15 Ms. Stone is great, as long as everybody is copied, and it's
16 not an ex parte communication.

17 **MR. BORNSTEIN:** Of course.

18 **THE COURT:** We are pretty efficient with those.

19 **MR. BORNSTEIN:** Thank you, Your Honor.

20 **THE COURT:** Okay. I am sure that I will hear from you
21 at some point, but it seems to me that at a minimum, we should
22 touch base at the end of February, beginning of March, with a
23 Joint Pretrial Statement due of April 9th. That means that you
24 should be meeting and conferring on trial exhibits about four
25 weeks prior to that, so in early March. And I think it would

1 be useful for us to meet just so we understand what that bench
2 trial is going to look like.

3 You know, I just don't know where we will be in terms of
4 COVID-19 and whether everything is going to be electronic,
5 whether we are going to have witness binders, whether we are
6 going to have you produce one set of exhibits, those kinds of
7 issues. So before you get into the nitty-gritty, it might be
8 helpful to have a discussion.

9 So why don't I put you back on my calendar for March 1st
10 at 9:30 a.m., if that works for everybody. I don't hear any
11 objection, so I'm assuming that's fine.

12 **MR. BORNSTEIN:** Yes, Your Honor. No objection.

13 **THE COURT:** All right. Anything else you want to talk
14 about today?

15 I will start with Epic.

16 **MS. MOSKOWITZ:** No, Your Honor, thank you.

17 **THE COURT:** How about Apple?

18 **MR. PERRY:** No, Your Honor. Thank you.

19 **THE COURT:** Mr. Lopez or Siegel?

20 **MR. LOPEZ:** No, Your Honor. Thank you.

21 **THE COURT:** Ms. Byrd or Ms. Moore?

22 **MS. MOORE:** No, Your Honor. Thank you.

23 **THE COURT:** Ms. Byrd?

24 **MS. BYRD:** That's a "no." Thank you.

25 **MS. MOORE:** No, Your Honor. Ms. Moore.

1 **THE COURT:** So I will get an order out. I will expect
2 to see a proposed form of order on your discovery issues at
3 some point. Perhaps I will see an administrative motion,
4 Mr. Lopez, and then an order relating. I think that's -- I
5 think that's all. Okay.

6 (Proceedings adjourned at 11:06 a.m.)
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Monday, October 19, 2020

Pamela Batalo Hebel

Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR
U.S. Court Reporter